IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS, et al,	§	
	§	
	§	
Plaintiffs,	§	
	§	Case No.:
vs.	§	4:20-cv-00957-SDJ
	§	
GOOGLE, LLC,	§	
	§	
Defendant.	§	

MOTION TO TRANSFER VENUE
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Thursday, March 18, 2021; 10:34 a.m.
Plano, Texas

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I N D E X

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March 18, 2021 10:34 a.m.

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P R O C E E D I N G S

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THE COURT: Good morning. Please be seated.

All right. We are on the record in cause number 4:20-cv-957, State of Texas, et al versus Google, LLC. And before we get counsel's introductions, I will note again for the record, as with our last hearing, we do have an audio-only feed right now that is going for the public and the press for this hearing on Google's 1404(a) motion. So I want to make counsel aware of that.

And we can have announcements made for counsel for the plaintiffs and for Google. And since we have a list of everyone who's present, if you all just want to confirm that the list we received yesterday is who's appearing, that would be fine.

MR. LANIER: Your Honor, Mark Lanier. I will confirm, on behalf of the State of Texas, that the list we sent in is accurate and up to date.

THE COURT: Thank you.

MR. YETTER: Your Honor, good morning. Paul Yetter for the defendant, Google. And the list we sent to Ms. Wear yesterday is correct.

THE COURT: All right. Thank you, counsel.

And today we do have Google's 1404(a) motion, and that is going to be our primary purpose today. I think after we have heard counsels' arguments on the 1404(a) motion, we may talk a little bit about the OGP. I did receive the parties' filing yesterday on that issue. And I will also want to get an update on the protective order issue from counsel, but we'll start with the 1404(a) motion.

I will remind all of our counsel and everyone who is coming in by video or audio, to please keep yourself on mute unless for whatever reason you're going to be addressing the Court.

So from a housekeeping standpoint, two things I want to get out of the way. The first is because we have the audio-only feed for the press and the public, and because we also have folks here in the courtroom, if there is anything that may be confidential or that might be under seal that needs to be discussed, which I don't anticipate, but if it happens, I will visit with counsel -- we can do a bench conference -- and we will need to make arrangements of how to handle that. That's one.

Two is just from a standpoint of how your presentations will go. So let me ask counsel for both sides if what I'm about to propose sounds reasonable. My plan would be to have Google begin -- it's Google's motion -- and have about 30 minutes to make its presentation, and I'll have

any questions for followup; and then allow the States to respond for 30 minutes; and then allow Google five minutes on rebuttal. And if I have any follow-up questions, we'll complete that portion of the hearing at that time.

Is that going to be sufficient time for both sides on this motion?

MR. LANIER: Your Honor, it will be for plaintiffs. Mr. Keller will be arguing that for the Court, and I'll do the rest of the discussion of anything else you've got afterwards. But the motion to transfer does seem fine to us.

MR. MAHR: Your Honor, Eric Mahr on behalf of Google. That's fine with us, too. I think we can do it under 30 minutes.

THE COURT: All right. And I would ask if counsel, when you're doing your presentations and when we're discussing the motion, can use the podium simply because our acoustics are better from the podium and I think everyone is going to want our record to be as clear as possible for this motion.

So with that, unless there's any other housekeeping matter, I'll let Mr. Mahr present Google's motion.

MR. MAHR: Thank you, Your Honor, and good morning. May it please the Court, my name is Eric Mahr from the firm of Freshfields Bruckhaus Deringer, here on behalf of Google.

We appreciate that you're well familiar with the

briefing in this case and with the requirements of the 1404 standard more broadly, so we appreciate your indulgence in giving us the time to present our thoughts on this.

Rather than rehash the briefing and the elements of the test, I really just want to take some time to focus on what we believe the three really most compelling drivers for transfer are in this case. And the first and the single most compelling driver for transfer is the fact that there already have been eight different complaints filed in the Northern District of California, several of which have already now been consolidated, and at least three of which were filed prior to the complaint in this case, months and months before.

Those Northern District of California cases present the came core claims arising out of the same alleged conduct concerning the same Google products and services on behalf of the same parties, publishers and advertisers.

Having these cases litigated in two different federal courts at the same time really undermines judicial efficiency and poses a very real risk of inconsistent judgments. And duplicative litigation is the most compelling driver for transferring this case because it really transcends the convenience of the parties and witnesses in any particular case. It transcends arguments over whether a flight from Boise or Bismarck is more or less convenient to

Plano than it is to San Francisco.

Instead, this duplicative litigation consideration goes right to the harm that -- the harm to the efficiency and the effectiveness of the federal judiciary overall, as well as the harm that inconsistent rulings and judgments would pose not just to Google, but to all of the tens, if not hundreds, of thousands of publishers and advertisers who rely on Google's products and services every day.

And it's just for these reasons that courts, when evaluating 1404(a) motions in the context in which there are multiple cases involving the same issues, have held that avoiding duplicative litigation takes precedent over the narrower interests in the typical 1404 case where there's only a single case pending.

As we cite in our briefs, in the *In re Volkswagen of America* case the federal circuit explained that when addressing the 1404(a) motion in the context of multiple lawsuits in different districts, the avoidance of duplicative litigation becomes a, quote, "paramount consideration when determining whether a transfer is in the interests of justice," end quote.

Now, while the federal circuit in that case was interpreting Fifth Circuit law, it didn't rely on any circuit's law to come to that conclusion; it relied on a Supreme Court case, the *Continental Grain* case, where the

Supreme Court explained, and I'll quote again, "to permit a situation in which two cases involving precisely the same issues are simultaneously pending in different district courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent," end quote.

So with that authority, not surprisingly, the district courts across Texas and in this district have embraced this principle when facing the prospect of duplicative litigation.

For example, in the *ExpressJet* case, the Southern District of Texas, the Court said that it could not conceive of an arrangement more expensive, time-consuming, or exhaustive of judicial resources than keeping this single suit in Texas while all of the other suits against the defendants are litigated. And in that case, it was the Southern District of New York.

Further, while this risk of conflicting judgment is a serious concern in any case, I suggest it's an even more serious concern in this case because the theories of harm that the plaintiffs assert and, maybe more importantly, the remedies that they seek, have a nationwide and really global implication; and again, not just for Google, but for all of the advertisers, publishers, and end users who use and benefit from Google's ad tech products.

Plaintiffs' counsel has already declared to the

media that their goal in this case is to, quote, "bust up Google," end quote. And even short of measures as radical and as unprecedented as that, any of the structural and injunctive relief plaintiffs are seeking in this case could not be limited to the Plaintiff States' orders, but would affect advertisers, publishers, and end users around the country and around the world.

Whether plaintiffs seek to bust up Google or to force it to redesign its products and services to benefit its competitors, or any of the other sweeping relief sought in the complaint, none of it could be limited to the borders of the Plaintiff States. You only have to look at plaintiffs' own complaint to see that.

Paragraph 4, both of the original complaint and in the amended complaint, alleges that, quote, nearly every customer -- "nearly every consumer goods company, e-commerce entity, and small business now depends on Google for purchasing display ads in order to market their goods and services to consumers."

Now, that might be a bit exaggerated, but it's certainly no exaggeration to say that the rulings in these cases will affect thousands and thousands of consumer goods companies and small businesses far beyond the borders of the Plaintiff States.

So, thus, that means the harm that would arise from

inconsistent ruling, which is always of paramount concern when there are multiple cases pending, is even greater in a case like this. And that alone, we would submit, is a compelling reason to transfer this case to the Northern District of California.

And just to orient the Court, I provided your clerk with two exhibits, handouts, which I've also provided to the plaintiffs; it just lists the cases that are pending around the country concerning these same ad tech issues.

THE COURT: Well, one question for you before you move on to the next, as you've put it, driver for transfer.

This issue of duplicative litigation, as you know, your friends on the other side have pointed out some differences in this litigation and in pending litigation in the Northern District of California, including some significant procedural differences with regard to the fact that you have class actions that are proposed in those cases.

And your colleagues on the other side have also noted that there are other actions pending in other jurisdictions besides the Northern District of California, and at least one of them I believe that has been referenced, the Georgia action, has been pending since 2019.

So I'm sure that Mr. Keller will be talking about that, but I would like to hear your response to those arguments which are raised in the briefing.

MR. MAHR: Thank you, Your Honor. I appreciate the opportunity.

So the class action issue first. In cases of duplicative litigation, the fact that some of the cases might be private cases with classes proposed hasn't dissuaded courts from enjoying the benefits of transfer, the efficiency benefits of transfer, in other cases. The one that easily -- most easily comes to mind for me is one I handled in 2008-2009, *Cephalon*, it's cited in the briefs, but there, the FTC filed an enforcement action in the District of Columbia, and my client moved to transfer it to the Eastern District of Pennsylvania where a number of class actions were pending.

And in that case, the Federal Trade Commission made all of the same arguments: We're seeking different relief; we are -- we're an enforcement agency; and we deserve special deference to our choice of forum; and class certification is going to hold us back. And the district court there held that none of those factors trumped the importance of avoiding inconsistent judgments.

And I think there's a number of other cases that are cited in our briefs where, you know, courts are used to managing these kind of issues, and there is certainly enough to do in these cases that both a case without class certification issues can move along in parallel or with a case with class certification issues. But all that will

happen more efficiently and fluidly if it's all managed by one judge.

The second question you asked was the other actions. And maybe I'll start with the Georgia action inform case. That case is different here both procedurally and substantively, and both those differences kind of explain why we haven't moved to transfer that.

First of all, it was filed in January of -- it was in late 2019. And in January of 2020, Google successfully moved to dismiss the claim. So before any of these other ad tech cases came along -- the first one was filed I think in May 2020 -- that case had already been dismissed.

The plaintiffs in the inform case in Georgia subsequently amended their complaint, and Google has filed a motion to dismiss that as well and that's pending. But it didn't make a whole lot of sense to seek to transfer a case that had been dismissed and that we expect will be dismissed again on the amended complaint. That's the procedural difference there.

The substantive difference there is, unlike all of these other cases we're talking about which are on behalf of publishers and advertisers, that case was on behalf of a competitor. And while there are a lot of allegations in the complaint, both Google and the -- Google argued, and the Court agreed, that the real core complaint that the

competitor had was that Google's decision to move from Flash to HTML5, I think it was, disadvantaged the competitor. They wanted Google to stay on Flash. And I don't know the technology that well. I know that these are two technologies that allow use of video and audio in advertisements.

And so it was a different question about a competitor arguing that Google's decision to change a particular technology it used disadvantaged it, and it wanted it -- it wanted Google to use the technology that the competitor preferred. Different issue completely than the kind of publisher and advertising issues we see here.

As for the other cases, there are three in the District of Columbia and one in the District of West -- Southern District of West Virginia. And in those cases, it's just a simple question of this case came up first in terms of our obligation to answer. We were served earlier in this case, and we moved as quickly as we could to file a motion to transfer because it's in Google's interest -- Google wants to move these cases along as much as anybody else. Google is not in the business of litigation, it's in the business of innovation.

And so we, as soon as we were served, first thing we did before answering was move to transfer. I think as a practical matter, we think that this case and Your Honor's ruling in here will have an effect on both our strategy, but

likely the other courts as well, as to whether they transfer their cases as well. But we just haven't reached a point of having to answer or file our motion to transfer in those cases yet.

If Your Honor were to transfer this case as we suggest you should, my expectation is that those other courts will follow suit. If Your Honor were to deny transferring this case, it wouldn't make much sense for us to seek individual transfer of those cases, and perhaps we would be in the situation with the JPML, perhaps not; we haven't crossed that bridge yet.

THE COURT: All right. Thank you, counsel. You can move on to, I think you had two more drivers that you wanted to talk about.

MR. MAHR: I do, I do. Thank you. The second point I would like to make, and it's a bit related to the first, but the harm that results from having the same claims arising from the same conduct litigated in two different federal courts isn't limited to just this idea of judicial efficiency and the risk of inconsistent judgments; although, that's more than sufficient, as I said, to justify transfer.

But redundant litigation really implicates all of the other, many of the other, considerations under 1404, most especially the convenience of third-party witnesses. Keeping this case in the Eastern District of Texas would basically

guarantee that the parties, the witnesses, the third parties, and the Court will suffer the very inefficiency burdens and risks that 1404(a) was designed to help courts avoid. And that's because our motion doesn't present the simple question of whether the issues presented in this case should be litigated in the Northern District of California or they should be litigated in the Eastern District of Texas.

The issue that our motion presents for Your Honor is whether the issues in this case should be litigated in the district -- in the Northern District of California or in the Northern District of California and in the Eastern District of Texas. Those eight California cases, and Judge Freeman has said she expects more to be filed, they're staying put, there's no motion to move them here or anywhere else.

So the witnesses in this case, both Google witnesses, key third-party witnesses, whether from Facebook or from any of the other competitors cited in the complaint that are based in the Northern District of California, they are going to be subject to the litigation burdens in the Northern District of California, no matter what. So the only question is whether they will also be subject to the same burdens here in a case that involves the same core claims and conduct.

That being the case, we think it's clear that the litigation burdens of two districts are going to be far, far

greater than litigation burdens in a single district.

So moving on to my third point, unless Your Honor has questions.

THE COURT: I can follow up at the end if I have more.

MR. MAHR: Thank you. So my third and final point is that even if we were to ignore the first two points and even if we were to pretend we just had the one case here, and it was the typical case under 1404 where the only consideration is that this single case, is it more conveniently located in the Eastern District of Texas or in the Northern District of California, we submit that still, Your Honor, the clearly more convenient venue in the interests of justice will be the Northern District of California. And that's because none of the factors recognized under the Fifth Circuit's 1404 test point decisively towards the Eastern District of Texas.

There is no unique and meaningful connection between this case in the Eastern District of Texas, while at least five point decisively in favor of the Northern District of California. And, as I said, I'm not going to rehash those individual factors because they're well briefed by both sides in the papers, but I did want to focus, for this final point, on what seems to be the main reason that the plaintiffs filed in the Eastern District of Texas, or at least one of the main

reasons.

The plaintiffs have made no secret of the fact that they filed here because they want to get this case to trial as fast as they can. Of course, the Eastern District has a reputation for being able to move cases fastly -- quickly. But plaintiffs' desire to rush their case to trial is not, in our view, a reasonable basis for denying transfer when there's so many other compelling considerations in favor of transfer.

Now, the closest the Fifth Circuit's 1404(a) factors come to recognizing this question of speed is the first public interest factor which is, quote, "the administrative difficulties flowing from court congestion." So three responses or points on that.

As a threshold matter, I think it's important to point out that the cases in this circuit have identified this factor, the first public interest factor, as the most speculative of all factors and one that can't alone outweigh other factors. That principle was most notably articulated in the *Genentech* case in 2009, but has since been cited in scores of Eastern District cases involving transfer.

The second goes back to this idea of duplicative litigation. Congestion is not served by having the same issues litigated in two courts. This is a big, complex case involving complex issues of market definition and a complex

technology. And having two courts work through that alone, that creates congestion, that doesn't solve congestion.

And third, and maybe most importantly, plaintiffs' desire to rush this particular case to trial shouldn't be given any weight under 1404(a) because the dangers of rushing a case like this are great, especially where it has the potential to affect so many.

Importantly here, I think we've already seen several ill effects of the Plaintiff States rushing this case. For one, this complaint was filed right in the middle of the Plaintiff States' investigation. In fact, the States seem to have abandoned their fact finding and investigating, and just skipped ahead to the suing part this summer, in a way I haven't seen before.

Last summer, the States served a massive document demand on Google, and the parties were beginning to negotiate compliance with that demand when the AG's office went quiet. There was no followup on the document demand. And more significantly, there was never any engagement with Google in which Google was given an opportunity to understand what the Plaintiff States' concerns were, to get its view of it, before the litigation was launched.

And I recognize the States certainly don't need me to tell them how to run a case, but I've been doing antitrust enforcement for 30 years, including on the prosecution side

for the Department of Justice Antitrust Division, and I at least haven't seen a government investigation in which the government did not engage substantively with the subject of the litigation and, instead, just fired off a complaint.

And again Plaintiff States can proceed however they choose, that's up to them, but as we had pointed out in this answer, this kind of shoot-first-and-ask-questions-later approach has resulted in plaintiffs' complaint containing a number of factual areas -- errors that still haven't been resolved in the amended complaint. I think, in fact, the fact of the amended complaint is evidence of this rushed filing.

It's only been three months into the case. We haven't fired a shot yet, just answered the complaint. And yet, we got an amendment on Monday with 29 new pages, 99 new paragraphs, significantly revising every single section of the complaint, if not every paragraph.

And again, I would expect that a case that's the result of kind of sober, deliberative government investigation effort on a -- following an 18-months investigation, would have been able to address some of these issues before it filed, and certainly would have been able to determine which Plaintiff States were onboard or not before filing. But that wasn't the case. So three months into the litigation, we're served with an amended complaint and kind

of back at square one.

Another consequence, the third consequence, of plaintiffs' rush to file this case in December is the confidentiality breach. And we'll probably get into this with my colleague, Mr. Yetter, when we talk about some of the protective order issues. But I think one thing neither side can contest is that in the course of plaintiffs' rush to file the complaint in December, an unredacted draft of the complaint was passed on to the New York Times and Wall Street Journal where it was reported on by both papers.

Now, it's difficult for us not to believe that had plaintiffs not been for whatever reason rushing to file in December, that additional confidentiality measures couldn't have been taken that would have avoided the leak.

So in our view, Your Honor, the rush, so far, has got us off to a bit of a poor start, and the idea that that should be a factor in the Court's 1404 analysis, we think, is misplaced. Again, no one's looking to delay this case, especially Google, but neither are we looking to rush it.

I'll conclude by saying the Texas Attorney General has stated publicly that he thinks this is the largest antitrust case potentially in the history of the world. And we certainly contest that and we hope to persuade the Court that there's no antitrust case here at all and no case at all here.

But just sticking with the transfer issue for today, if this is the largest antitrust case in the history of the world, we see no sense at all in litigating it twice, once in the Northern District of California and another time in the Eastern District of Texas. Thank you, Your Honor.

THE COURT: All right, Mr. Mahr. I may have follow-up questions for you, but I'll let Mr. Keller go ahead with his presentation.

MR. MAHR: Thank you, Your Honor.

MR. KELLER: Good morning, Your Honor. And may it please the Court, Ashley Keller on behalf of Texas. And I'm also proud to say that Mr. Lanier and I now represent North Dakota, South Dakota, and Idaho as well.

Can you see me and hear me okay?

THE COURT: Yes.

MR. KELLER: Very good. As Your Honor is aware, Google is a repeat player in the Eastern District of Texas, and its filed many 1404 motions before. And so I think it's useful to take a step back and just remind the Court of what it has told Google in the past, most recently in *Seven Networks* and in *Rockstar*, which is when conducting the 1404 analysis, it's important to be specific and not talk in generalities. It's also important not to use carefully parsed language to shade over the *Volkswagen* factors.

But, unfortunately, I think Google has ignored that

admonition with respect to this motion and, to quote Yogi Berra, *it's kind of déjà vu all over again*. And I think you're going to see that throughout the public and private interest factors as we walk through the analysis.

So let me start with the first private interest factor in that regard. As this court, again, said in *Seven Networks*, the first private interest factor is focused on documentary and physical evidence, the location of documentary and physical evidence. Google is not supposed to talk about the location of witnesses with respect to this factor; that's double counting, those are factors 2 and 3. But if you look at Google's motion, they're talking about the location of witnesses when they are attempting to identify the location of physical evidence and sources of proof.

Furthermore, they don't provide any specificity with respect to the location of physical evidence and sources of proof. They note that they have their headquarters in the Northern District of California, and so it would be some other companies that might be relevant to this case. But headquarters are not physical evidence, they're not documents.

So why is Google not being specific? Because they know perfectly well that the overwhelming majority of physical evidence in this case is electronic, and that means it's stored in Google's data centers. Where are those?

Google doesn't tell you, but none of them are located in California. The 13 data centers that Google has located throughout the country, zero in California; only two of them are located closer to the Northern District of California; one of them is right here in Texas, 50 miles away.

And just this morning, the CEO of Google announced that they're going to spend $7 billion increasing the size of these data centers. They didn't announce that they're opening any in California, but they're increasing their investment right here in the State of Texas.

And so on Google's side of the ledger they've identified no documents or other physical evidence. And if you look behind the curtain, you'll see that most of the physical evidence is going to be located closer to the Eastern District of Texas.

Meanwhile, on our side of the equation, we've pointed to ten declarations that identify specific physical evidence that's located closer to the Eastern District of Texas. And we further point out that as a result of the 18-month investigation that Your Honor is aware has been ongoing, we now have access to physical documents that are in Austin. Google says, well, that's not relevant because Austin's not in the Eastern District of Texas. But again, that's shading over the actual inquiry under this factor.

It's not where the documents are in this Court

versus in the Northern District. It's the relative ease of getting the documents to the courthouse that Google's proposing. Where is it easier to get documents from Austin? To the Eastern District or to San Francisco? We all know the answer to that question. And so, to my eyes, the first factor overwhelmingly tilts in favor of the Eastern District of Texas; certainly on the record that Google has created, that is the case.

If I could, let me jump to the third private interest factor which in *Seven Networks* and *Volkswagen*, this court and the Fifth Circuit respectively says is the most important, which is the convenience to witnesses. Now, you are supposed to look at all witnesses, party and nonparty. But of course, the convenience to nonparty witnesses weighs the most heavily, and that just makes logical sense.

This is a big case. It's important to all of the parties. It's certainly important to the sovereign Plaintiff States and Puerto Rico. It's important to Google; they're going to make their witnesses show up when it serves their interests. It's the nonparty witnesses who are being burdened the most when they have to testify, and so that's why the Fifth Circuit says you give significantly more weight to the nonparty witnesses.

But let's start with the party witnesses. Google identifies 151 party witnesses that it says may be called to

testify in this case, but they bury the lead; 57 percent of those witnesses are located closer to the Eastern District of Texas and not to the Northern District of California; they're in New York. And so even for Google's witnesses, it's more convenient, it's less costly, for them to come to this district as opposed to going to San Francisco.

And, obviously, our group of sovereign states has recently expanded, but the overwhelming majority of plaintiff witnesses are going to be located -- party witnesses are going to be located closer to this courthouse. And, obviously, the State of Texas took an important role in this investigation and in filing this lawsuit, and they're right here at home. Austin is a lot closer to this courthouse than it is to the Northern District of California. So when you talk about the convenience to the party witnesses, less important, it points to this courthouse.

What about the nonparty witnesses? Again, Google provides zero in its opening brief, zero specific witnesses that are nonparties that they think need to testify who are located closer to the Northern District of California. Then in reply, if you even choose to consider arguments and evidence first raised on reply, they point to two witnesses from Facebook, one of those witnesses located closer to the Eastern District of Texas. So even the arguments that they raise for the first time in reply don't really point to the

Northern District of California.

Meanwhile, Texas has identified a baker's dozen of witnesses who are located -- for nonparties, who are located closer to the Eastern District of Texas, and have submitted declarations that they would be willing to testify in this courthouse. So the evidence overwhelmingly points in favor of the Eastern District of Texas.

Now, what does Google say in response to that? Google's reply says, well, we're a big company. We do business everywhere. We've got customers all over the place. And so, of course, Texas was able to locate some people who they allege were harmed by our anticompetitive conduct, who would be willing to say they could testify in the Eastern District of Texas. But pay attention to the aggregate statistics, again not specifics, not naming anybody by name, but we've got something like 40,000 customers in California, and there's only 14,000 or so customers in Texas.

Respectfully, Your Honor, I think my friends are making a completely inaccurate argument. And I know they're going to agree with me at a future phase of this case, and here's why. We have a lot of respect for this Court's Article III authority and the Supreme Court's admonition that you can only issue relief for the parties who are actually in front of you.

I know that Google is going to say, at a later

phase of this proceeding when you're fashioning injunctive relief -- assuming we win on the merits, you have to fashion it in a narrow way to provide relief to the actual parties to the case or controversy. For good or for bad, the Attorney General of Texas doesn't speak for the people of California. Texas is here in parens patriae on behalf of its own citizens for harm that occurred in its own state. And the same is true for the other sovereigns. We don't speak for California.

And so all of the harm that allegedly occurred for customers in California, who none of the sovereigns here represent, is irrelevant; those aren't relevant witnesses. You would never call somebody and say I've been injured, even though you can't grant me relief, Your Honor, but let me tell you all about what Google's done to me. You would call the actual parties who have been injured who you can fashion relief for.

And so the 14,000 customers that are in Texas are absolutely relevant. The 40,000 customers in California, where the attorney general has not chosen to join this lawsuit, they are completely irrelevant. So the third-party witnesses factor, again where we've identified specifically parties who are actually harmed and who this Court can fashion relief for, that's relevant, that gets the most weight in the analysis, and it tilts sharply again in favor

of the Eastern District of Texas.

So let me toggle from that to the compulsory process problem, which is technically the second private interest factor, but I thought it was more logical and flowed better to address it in this order.

Once again, in *Seven Networks*, the Court held, and in *Quest Med Tech* as well, this factor is most relevant for unwilling witnesses. Those who have to be subpoenaed and you have to use compulsory process to bring in front of the court, that that's where this comes into play. Once again, Google has identified zero, not a single specific nonparty to this case, who they say is unwilling to testify but would be within the subpoena power of the Northern District of California. And so on this evidentiary record, it can't point to anybody that supports them on this factor.

And again on the other side of the coin, logic simply dictates where you have parties who are injured in Texas, there are going to be some that are within a hundred miles of the Eastern District of Texas. And so to the extent any of them would be unwilling to testify in California but would be willing to testify here, or they would be unwilling to testify here but you could compel them to do so, this factor once again tilts in favor of the Eastern District of Texas.

Let me spend a moment on the final factor, Your

Honor, which is normally just a catchall category. If the first three factors go our way, I think both sides agree in their papers that this factor goes our way as well; and they would say if all three go their way, this factor goes their way as well. But this is where I want to respond to some of the points that my friend made, because they shoehorned judicial economy into the fourth factor, and there's a lot to unpack here.

First, let's talk about the differences between this action and the other actions that are pending in California, which was the thrust of Your Honor's question to my colleague. First, with respect to the class action nature of those cases, the procedural nature of going through a class certification motion, as Your Honor is aware, is highly complex, it's completely irrelevant for the 15 Sovereigns who are in front of you.

And I would predict, from a judicial economy perspective, they are still going to be dealing with class certification before this case is tried in front of a jury, based on the statistics but normally obtained, in the Eastern District of Texas. And so throwing the sovereign States, who are not subject to a class action and want to have nothing to do with a class action, into that procedural morass does not improve judicial economy.

But there is another procedural point, a threshold

procedural point, that I think is extremely important. Google has moved to compel arbitration in the ad tech case in California, and they have every right to say that their contracts with their clients provide an arbitration clause -- an arbitration clause, by the way, that requires individual arbitration.

And so you heard a lot from my friend about how there is a risk of inconsistency and we don't want to duplicate proceedings. But what has Google done? Like a lot of big companies with arbitration clauses, it has effectively said you must conduct thousands upon thousands of individual arbitrations before individual arbitrators if you want to get relief from us. That's what the contract says and we're sticking by it. The Federal Arbitration Act embodies a strong public policy in favor of arbitration, and we're going to exercise our contractual rights.

I don't begrudge them from doing so. It's their contract and they have a right to do it. But when they come before this Court and they say they're so concerned about duplicative proceedings and we can't have the risk of inconsistency, they're inviting precisely that. They want thousands of individual proceedings.

I promise Your Honor -- this is a complex case, the issues are important, the law in antitrust is often not crystal clear -- if you impanel thousands of individual

arbitrators to decide the merits, they're not all going to go one way or the other. And so with respect, I think given that Google has moved to compel arbitration and is essentially inviting thousands of individual proceedings, the notion that they're all that concerned about inconsistency strikes me as a little bit pretextual.

Now let's talk about the Georgia case which again Your Honor specifically asked my friend about. My friend gave a couple of answers that again I find puzzling when it comes to the 1404 analysis. The first answer he gave for why that case wasn't transferred, and Google never made any effort to, is they won a motion to dismiss; and then the plaintiffs did what plaintiffs often do when there is a dismissal without prejudice, they re-file.

And so Google is effectively saying, well, we don't care about all that efficiency stuff as long as it seems like we might have a good judge and we might win; when the outcome goes our way, we're fine to not to move to transfer. But that's not relevant to the 1404 analysis.

The next thing they said is, well, that case was on behalf of a competitor as opposed to a customer. And I would say, okay, the identity of the plaintiff matters. This case is on behalf of 15 sovereigns, and so that too should counsel in favor of this action being treated differently.

We have 15 sovereign entities, 14 states and Puerto

Rico, in this case. This isn't just a single action, when you look at my friend's demonstrative that he prepared this morning. And so to my mind, this is the case that has the center of gravity behind it, this is the case that is going to be moving forward that is going to be attracting most of the attention. Everybody else ought to come here if they want to do a JPML, which they reserved their right to do in the future, as opposed to sending things to California.

Let me quickly turn to the public interest factors, Your Honor. The first one, I don't think there is actually disagreement between us, which is that this Court moves more efficiently than the Northern District of California. The most that my friends on the other side could say is, well, this factor is the most uncertain, and so don't give it that much weight.

But the statistics right now are just overwhelmingly in favor of the Eastern District of Texas. The Northern District is significantly backlogged. I think the average time to trial here would be something like 12 to 18 months; it's 44 months in California right now. And we don't have to speculate here. There's been a stay of discovery issued in some of the cases in the Northern District of California, where the trial at the earliest is slated for 2023. And so if this district follows anything remotely approaching its ordinary course, this is going to be

an even more efficient forum, and so this factor clearly tilts sharply in favor of the Eastern District of Texas.

And then the final point I'll just cover on the local interests, Your Honor. We're here with the State of Texas as a sovereign entity, obviously, as a plaintiff. Of course, when exercising its parens patriae authority on behalf of customers who have been harmed by Google's anticompetitive conduct, there is a strong local interest.

This is not just, you know, the jury being asked to be impaneled, which is what the Fifth Circuit is concerned about, for something that has nothing to do with the locality. There are people in the Eastern District of Texas, businesses within the Eastern District of Texas, who have been meaningfully harmed by the conduct that we allege in the complaint. And so the notion that this factor goes against us because Google is headquartered in California, I'm not sure that it passes the straight-face test.

Let me just conclude with something that I'm not sure was really one of the public or private interest factors, but it goes to some of the comments that my friend made at the end. I take exception, and I'll use a kind word, to the notion that this has been rushed and that we jammed through our complaint and that it was riddled with factual errors, and we're already off on the wrong foot here.

We take our obligations to this Court, as officers

of the court, extremely seriously. The public officials who are involved in this case similarly take their obligations to their own citizens extremely seriously. This would not be the first time in U.S. litigation history where a defendant said that a complaint wasn't accurate factually. That's why they get to answer, and we have discovery, and we have a civil justice system where the facts get sorted out. But it shouldn't come as a surprise to anybody that we have different perspectives on that.

But the idea that we're jamming through documents to this Court and rushing the process is incorrect. We are in a hurry, though. We do want this case to go to trial. And we agree, of course, with Attorney General Paxton and others that this is a meaningful antitrust case.

The reason that we're in a hurry is because Google is so large and has its tentacles spread throughout the entire U.S. economy in such a pervasive way that the harm that they are doing, based on the facts we allege, occurs every nanosecond of every day. So, yes, we want to get redress expeditiously and, guilty as charged, that is part of the reason that we proudly chose the Eastern District of Texas. We don't apologize for that for one second.

But there is a huge difference between plaintiffs wanting to get access to justice expeditiously and sloppy tactics which we were accused of, and we frankly resent the

implication. I'll close there, Your Honor.

THE COURT: You know, Mr. Keller, before I have Mr. Mahr give his rebuttal, I did want you to respond a bit further to the point that he made regarding duplicative litigation. You've talked about it a bit. I note that Mr. Mahr referenced some of the language in case law talking about duplicative litigation being a paramount consideration.

And I'm curious, your response, on how that consideration plays against all of the public and private interests factors. I've heard and understand your argument regarding just how duplicative the litigation is, let me put it that way, in terms of issues, in terms of parties, but I'm interested in your take on the case law with regard to that being of paramount consideration, how does that compare if you are looking at all the other factors also?

MR. KELLER: Sure.

THE COURT: If the other factors were pointing against transfer or the other factors did not establish that it was clearly more convenient to move something, would that consider -- could that consideration nonetheless trump those, the typical private and public interest factors?

MR. KELLER: I'll do the best I can to answer your question, Your Honor. But as you are familiar, this is clearly operating in the realm of standards as opposed to bright-line rules. Courts have said repeatedly the factors,

no one of which is dispositive, they're not even exhaustive; you can consider other things; the facts and circumstances of any particular situation can be different. And so with that as the rubric, it's sometimes difficult to sort of say, well, aha, this one factor can trump everything else.

I certainly don't think, on the facts and circumstances of this situation, the judicial economy argument that my friend made, even if you took it on its own terms, would trump all of the other factors that we say go our way based on this evidentiary record. But as you heard me say before, and I'm happy to expound if I didn't provide a sufficient answer, we don't think that there's going to be a great deal of judicial economy considerations that would be paramount in this case, just given the procedural differences.

And I do agree with my friend. The cases don't have to be identical before you take into account judicial economy, but class actions are a different beast. Arbitrations are certainly a different animal than what we're pursuing here.

And one final point that I think is worth noting. A lot of the reason the cases in the Northern District of California are pending there is because again Google, well within its contractual rights, has put in a forum selection clause, and so plaintiffs there had no choice but to sue in

Google's backyard. The sovereign States and Puerto Rico here should not be held to the contract that Google hoists upon its customers when, of course, Google has no right to do that to sovereign entities.

THE COURT: All right. Thank you, Mr. Keller. And finally -- I'm going to ask Mr. Mahr the same question along these same lines -- recognizing that these factors are all looked at together in the analysis of 1404(a), are you aware of any cases where you've seen a court say notwithstanding the fact that if we took the other factors together, it would indicate one thing, but this paramount consideration of duplicative litigation leads us in another direction; in other words, a court that said even looking at all the factors together, this particular consideration is so significant that even though the other factors cut against it, we think the result should be transfer?

MR. KELLER: A one-word answer: No.

THE COURT: All right. Thank you.

MR. KELLER: Thank you, Your Honor.

THE COURT: Mr. Mahr, you can -- I have a couple of questions for you, and I'll let you do your rebuttal, as well.

So my first question is, just to get your answer to the last question I asked Mr. Keller, you have emphasized, and it seems to me that Google's argument depends very

heavily, on the duplicative litigation argument. And so I am curious if you have any case law where that factor, in the context of a court's consideration of all the factors, the private and public interest factors, has weighed in a dispositive manner, notwithstanding the fact that maybe the other factors would not have supported transfer.

MR. MAHR: Well, I think in -- one is the *Cephalon* case I mentioned. You know, I don't know a case where every single factor went against it and the judge said forget it, it doesn't matter, paramount consideration. But I would say that the Supreme Court's language, the -- in the language of the courts that have addressed this issue, have -- calling it paramount is an indication that it outweighs those other factors. But certainly *Cephalon*, there were another -- a number of factors.

THE COURT: Well, the reason -- part of the reason I raise that is that as your friend on the other side, Mr. Keller, was mentioning, one of the other factors -- and this has to do with convenience of witnesses -- you will see any number of court opinions that talk about as the most important factor that a court will look at is convenience of witnesses. So we have courts using language to convey the importance of certain factors.

The factor that you are relying on, the duplicative one, falls under that -- generally speaking, falls under the

all-other-practical-problems factor, at least in the cases that I see, and in this district it's often referenced immediately under that factor, the possibility of duplicative litigation.

And so part of the reason I ask you this question is because you do have language with regard to at least one of the other factors the Court is looking at, and that has to do with the convenience of witnesses that say that is the most important thing the court is looking at, and then you also have your language with regard to duplicative litigation.

So I think you've answered my question, but I did want to see if you had a case where this duplicative litigation issue was so significant that it trumped other factors.

MR. MAHR: Well, *ExpressJet* is an interesting case for that purpose. *Cephalon* is an interesting case, as I was saying. And in the D.C. Circuit test -- case -- test under 1404, unlike here, the plaintiffs' choice of venue is given substantial deference, and yet it was overruled in favor of paramount -- the paramount consideration of the duplicative litigation.

But here's why that issue doesn't I think come out as in sharp relief as you're asking. It's because when you have duplicative litigation, by definition those other

factors are going to go towards the transfer of district, also. I agree many of the cases say convenience of the witnesses is also the most important factor, at least of the eight. But when you have duplicative litigation, if you're talking about a witness who is actually material to a case, having two cases is never going to serve the convenience of the witness because they're going to have to testify in two cases.

So say you're talking about one of the competitors here, or a truly material meaningful witnesses in this case. If there are two cases going on and that witness is truly a unique and meaningful witness in the case, they're going to have to testify in two.

So I don't think it will be that often where you'll see, well, duplicative litigation stands alone, but it would be more convenient to the witnesses for it to be litigated in two jurisdictions at once, or it would be better in terms of court congestion to have two courts wrestling with these issues at once. So you don't get that everything going one way, and duplicative litigation going the other way.

THE COURT: Well, and that, your answer, may be a good segue to the second question I have for you, which is admittedly a broad question, but it's raised by Mr. Keller's presentation and I did notice it in the briefing, which is the 1404(a) analysis is an analysis that needs to drill down

on these issues. It needs to drill down, for example, with regard to the compulsory process factor, to name one, of what witnesses have you identified that are nonparty witnesses that are unwilling witnesses. I'm not aware of any that Google has pointed out.

It needs to drill down on who the nonparty witnesses are who it would be not convenient to testify here in the Eastern District as opposed to the Northern District of California. As your friend on the other side pointed out, I don't recall seeing any in the original motion and I only recall seeing a couple in the reply, one of whom it didn't necessarily appear it would be more convenient to appear in the Northern District of California.

And I won't go into all the other specifics, but I do -- I feel like Google's filings have a lot of broad statements, for example, about documents and access to sources of proof, and broad statements about witnesses, but not a lot of drilling down in detail and support in the way that the plaintiffs have. And that's why I say I feel like you've relied very strongly on the duplicative litigation issue.

Your friend on the other side has pointed that out in his presentation, and so I would like to get your response on those issues and where that proof is that, as you put it, there are five factors that work in favor of transfer.

MR. MAHR: Certainly. And so I'll focus on witnesses, and maybe start with the Fifth Circuit's -- another *Volkswagen* case, this is the 2008 *Volkswagen* case by the Fifth Circuit. Footnote 12 of that case, they made clear that there is no kind of blanket rule requiring affidavits and specific people. And I think that's particularly appropriate in a case like this where you have this massive complaint; we're moving the beginning of this litigation; and the idea that, for example, we can go out and get affidavits from unwilling witnesses, unwilling witnesses are not great candidates for getting affidavits from to support a venue motion. But I think more importantly, at this stage of litigation, there are enough indications of where the witnesses are, and it's also clear that there are none here that would suffice in this kind of case, and I'll explain why.

The witnesses -- and to do this, I would like to contrast the witnesses identified by the plaintiffs versus the witnesses identified by Google. After an 18-month investigation and collecting 3,000,000 documents, and interviewing 64 third-party witnesses, the plaintiffs were not able to show that one of those witnesses, not one of those witnesses, of the 64 is located in the Eastern District of Texas. Now, they argue, oh, about half are closer to the Northern District of California, many of them in the Northern

District of California, and half are closer to Texas, but that's closer. We have witnesses that they interviewed in the Northern District of California, and none in the Eastern District of Texas.

Mr. Keller referred to the baker's dozen of affidavits. These are affidavits handpicked for this motion. And even out of the 13 affidavits created for this motion, only 4 of them are even in the State of Texas; and again, not one of them is mentioned in the complaint; the other 9 are spread around the world, including in France and in the UK.

And there's a number of cases, *Fujitsu*, *Genentech* and *Rizvi* -- *SEC v. Rizvi*, that says once you're traveling a significant distance, the additional hour or two from -- between one plane flight and another isn't material compared, when weighed, against witnesses that are in one of the two districts.

And, third, with respect to these 79 companies who the plaintiffs say they think may be Google customers, only one of which is named in the complaint, none of them are unique. And that was our point about the fact that there are a 198 publishers based in the Northern District of California, and just 6 in the Eastern District of Texas. There are 40,000 advertisers based -- these are Google customers -- based in the Northern District of California, and a third of that in Texas. They're using broad numbers

and we're using broad numbers, but it's not -- it's to show where the weight of the evidence is in the case.

But so out of all of the different ways the plaintiffs have come up with to support the jurisdiction in terms of witnesses, they still haven't come up with one who is actually material to the investigation, who is identified in the complaint, and who is in the Eastern District of Texas.

Now, what did we do? Again, I don't think we were in a position to be able to go around and get affidavits from our competitors and any of the, again, tens, if not hundreds, of thousands of publishers and advertisers. That's going to take a lot of funneling in the course of discovery to find which ones are material. But what we did do is use the plaintiffs' complaint, and that's where we based our identification of witnesses on; we didn't make it up.

We didn't make up 151 current or former Google employees. Those are documents -- those are Google employees whose documents were identified in the complaint plaintiffs filed. Of those 151, 67 are in New York, 60 were in California, 16 were in other countries or other states, and not one was even in the State of Texas, much less the Eastern District of Texas.

And then there are 9 current or former Google employees identified in the complaint, 7 in New York, 2 in

California, not one in the State of Texas, not -- in particular, the Eastern District of Texas.

We looked at the 13 competitors who are referenced in the complaint who are likely to be critical third-party witnesses in an antitrust case. Again, none of them are in the Eastern District of Texas, and all of them have offices in the Northern District of California.

And finally, we looked at the 10 current or former Google employees whose depositions the Office of Attorney General of Texas attended; 6 were in California, 3 in New York, 1 in Colorado, and not one in Texas or in the Eastern District of Texas.

So our point is that there is not a single witness, material witness, that they've identified with a unique connection to this case in the Eastern District of Texas, and there are a plethora of them in the Northern District of California.

THE COURT: How do you respond to Mr. Keller's argument that, you just noted it yourself, of the I guess it's party witnesses that you identify that a large number of which are in New York? This is a case that you, yourself, today have said is a national and, arguably, international reach. In a case like that and given the number of party witnesses that you have that are even party witnesses that are not in the Northern District but are elsewhere in the

United States, how does that play out for your motion?

MR. MAHR: Well, I would go back to the -- those cases, the trio of cases -- and there are many more, I just picked three -- *Rizvi*, *Fujitsu*, and *Genentech*. *Rizvi*, in particular, this Court, the Eastern District of Texas, said they don't see a material difference flying -- I think in that case it was from Philadelphia or Washington to the Eastern District of Texas versus the Northern District of California; and that that distance, I don't think that's a material consideration, especially again when weighed against the existence of witnesses who are in one of the two candidate jurisdictions.

THE COURT: All right. And your response -- I would like to hear your response regarding the duplicative litigation issue that you raised, and that Mr. Keller noted, you have the arbitration provision being enforced. You've talked about the class action issue. You and I didn't talk about the arbitration issue that was raised, and that in and of itself would generate potentially a lot of different results, according to what your colleague has said. And what's your response to that?

MR. MAHR: Well, first of all, there's a factual element to it that only two out of twelve class representatives in the California cases are arbitrating in the case. And so it is not going to be that every class

representative -- and I don't know the details of who signed what or how, who it's enforceable against and who it's not enforceable against, but the fact is there are only two out of twelve, and that's just the class representatives. So it's not a case where this case is going to go to the Northern District of California, and then all of the class actions are going to disappear because everyone's going to be going into thousands and thousands of arbitrations. That's just not the case. There's two.

But second, I'm not sure that the defenses that might be lodged in the eventual case are a proper basis to make a determination as to whether those defenses are based -- handled by a single judge or by two judges at the same time. But again, I think the real fact is that it's just two out of ten at this point.

THE COURT: All right. The last item I wanted to ask you about, before I let you make any other remarks on this, are two items with regard to the standard that courts go on to apply the motion. The first is that, I take it, you would agree that the burden here is on the movant to show under this analysis that it is clearly more convenient to be in the Northern District of California; in other words, not that it may just be just as convenient to go to the Northern District of California, but that it is clearly more convenient to be in the Northern District of California.

Would you agree with that, Mr. Mahr?

MR. MAHR: We agree with that and we embrace that both, whether you're looking again at the individual criteria or this paramount issue. I just would note, if I may, Your Honor, clearly -- you could say clearly or you could say clearly, and the emphasis -- it's important to note that the outer bound of it is the forum non conveniens where it's substantially more convenient, and 1404 is specifically designed by the legislature to have a, the courts found, to have a standard below that.

THE COURT: I'm aware of that.

MR. MAHR: Okay.

THE COURT: Yes.

The other is that when deciding this motion, the Court can consider undisputed facts outside of the pleadings, such as affidavits and declarations, but it must draw all reasonable inferences and resolve factual conflicts in favor of the nonmoving party. Would you agree with that?

MR. MAHR: Yes, Your Honor.

THE COURT: All right. Any other rebuttal that you would like to make? I've kind of peppered you with a few questions here.

MR. MAHR: No, I appreciate your questions.

Just three points. First, my friend represented -- referenced the Google cases as if we've been told this

before. These motions aren't decided on the identity of the party. But it's interesting, if you look at the cases that Google has tried to transfer previously -- because sometimes they've been transferred and sometimes they have not -- the cases that have not been transferred, some of which were mentioned by Mr. Keller, *Seven Networks*, the Court in that case, in addition to looking at the other factors, said that it had already spent significant resources keeping the case on track in this district and coordinating with a similar pending case in the Northern District of Texas. So there you have the consideration of having the same -- the same cases in the same -- at least the same state in that case.

In the *Smartflash v. Google* case, same thing, there was a significant factual overlap between that case, the Court found, and another case within the same district, the Eastern District of Texas.

Content Guard, same thing, the instant case and the co-pending Amazon action before this case, the courts substantially overlap.

And then *Rockstar Consortium* was also mentioned. *Rockstar* is based in Plano, Texas. There was -- there was an obviously material witness with a unique and meaningful connection to this district; something that's absent here.

So Google did learn from those cases, and it's that when there are efficiencies that come from having cases that

are similar in the same jurisdiction, that jurisdiction is the preferred venue.

THE COURT: Well, let's talk about *Seven Networks* for a moment because that came up in your colleague's discussion, and one of that is the items that the district court discussed in *Seven Networks* was on access to sources of proof. And it seems that there were maybe a similar, arguably a similar, disconnect in that case, and it seemed in that case that Google generally referred to where its headquarters was in terms of where its sources of proof were.

But the district court, along the lines of what's been alleged by your friends on the other side, said, well, there is actually, where these materials are stored are actually in -- it was a lesser number of centers across the country than what are identified in this case. Yet, your colleagues on the other side have identified 13 data storage centers across the country, and you heard your colleague's argument on that. And from what I've seen on Google's filings, again I haven't seen anything specific in your filings to contradict that.

MR. MAHR: Well, there are 13 data centers across the country, and there's one in Texas, there is also one in Nevada and one in Oregon. But, I mean, I think this is an interesting factor, the first private interest factor, because now that we're -- everything is digitized, on the one

hand, all of this is accessible anywhere. On the other hand, courts have made clear this is still a relevant factor.

But the fact that a particular 1 out of 13 data centers happens to be here doesn't tell us anything about what data is stored at that center, and I couldn't begin to tell you. And data centers are not a place where there are employees sitting there and you knock on the door and say *I would like some data. Can you please put it in the back of the car and I'll drive it to the courthouse*.

So I don't think data centers which are generally stated -- generally located in places where real estate is available at a lower cost than say in the middle of Dallas or the middle of San Francisco, and so I'm not sure that they -- I guess I would disagree with the court in *Seven Networks* that that was -- should have been such an emphasis.

THE COURT: All right. Well, I think this is an area where I think specificity helps because I think the test is where data is stored. But there's a reason why a party thinks that shouldn't be meaningful, then I need an explanation as to why it isn't meaningful. I think just a general reference to where your headquarters is, standing alone and in the context of having data being stored in other locations, you would need more explanation as to why that's not significant or that shouldn't be considered significant.

But let me ask you a different question which has

to do with your -- the point you just made about some of these cases involved a local -- you know, local businesses in Plano or elsewhere in the district. We do have the State of Texas as a plaintiff in this case, and the State of Texas is here a cross sovereign, but it also has asserted it's here in a parens patriae capacity. And so that suggests that the State is representing the interests of individuals and businesses across the state, including in this district. And this state as a plaintiff, in any case, presents a different kind of plaintiff. I'm curious what your, you know, how your response regarding plaintiffs in the district or representing interests in the district plays out, given that you have the State here both as a sovereign and a parens patriae role.

MR. MAHR: Yes, Your Honor. And we certainly respect the sovereignty of the State and recognize its interest in its citizens. Here, I think in this question of weighing that in the 1404(a) analysis, you have to consider that as kind of one-tenth of what it would normally be on the regular complaint; and now in the amended complaint, one-fifteenth. There's just one of many sovereigns in this case and they each have those same interests, and not all of them are in Texas, obviously, just one-fifteenth of them.

THE COURT: Have you seen cases where the fact that there is more than one sovereign in a case undercut that plaintiff's -- the fact that a lead plaintiff had chosen a

particular forum?

MR. MAHR: I haven't seen that, but I've also --

THE COURT: I can tell you I've seen a case where it didn't, out of the Northern District of California. I don't know if you're familiar with the case of *California v. United States Bureau of Land Management*, it's at 2017 Westlaw 8294171. In that case, you had the State of California, the State of New Mexico, and a group of environmental organizations that had filed a lawsuit, and there was a 1404(a) motion. And the Court, in that case -- now, this is in the context of talking about deference to the plaintiff's choice of forum.

And the Northern District of California in that case said there's some substantial deference, may be even more, given that you have the sovereign State of California in that case. And as far as I can recall, I don't see a word about the State of New Mexico and the fact that the State of New Mexico in that case would undercut somehow that choice.

And so I'm wondering if you have other cases where the fact that there is more than one sovereign would undercut the fact that a lead state or that at least one of the states in a case plainly has an interest in the subject matter.

MR. MAHR: I don't have a case that says that, Your Honor. But I would suggest that different tests in different jurisdictions have different ways of treating the choice of

the plaintiff in terms of venue, period, as well as the plaintiff's choice of venue when the plaintiff is a government enforcement agency. And as I was mentioning, the *Cephalon* case earlier. In the D.C. Circuit's case, it's given substantial deference -- I think they even use the word "paramount" -- in that district, the plaintiff's choice of forum, and that's because that's what that particular test is.

And as we know in the Fifth Circuit, there is no deference given to the plaintiff's choice of forum whether a government entity or not, but that is baked into the test, that's where we get to clearly demonstrate, and the Fifth Circuit has said that's where the respect for the choice goes.

THE COURT: Well, I suppose that case just makes me wonder whether it should get less deference in this context -- do you see what I'm saying -- that you have at least one state that clearly has an interest, but I think you've suggested in your briefing and here today that it should get less, that should have less importance, because there are other sovereigns. And I'm not sure that that's accurate.

MR. MAHR: Well, I think -- and I don't have a case for you, but I wouldn't say that the deference comes out in the case whichever way you would decide that issue. If you

would decide the issue that full deference goes to Texas, it's still a clearly demonstrate test. And if it was only one-fifteenth, it would still be the clearly demonstrate because the Fifth Circuit says that that deference to the choice is reflected in the test.

THE COURT: All right. Thank you.

MR. MAHR: Do I have time for one more?

THE COURT: Yes, you can.

MR. MAHR: I did want to address the question of similar issues because maybe we haven't put enough stress on that, but the Supreme Court even says the identical issues, the *Continental Grain* case from 1960. And that has been relaxed a bit by other courts who have said the same or similar issues in the last 60 years. But we're comfortable with the identical issues because there are many identical issues that will have to be resolved in this case that will also have to be resolved in the Northern District of California case; they include, at the outset, market definition.

There are multiple markets in this case. And markets in this case are dynamic and evolving; they're different today than they were ten years ago, and they'll be different tomorrow than they are today. That makes -- not that -- you obviously can handle that and so can Judge Freeman, but having two judges do that at the same time I

think is a real -- a problem. Also, some of these markets involve two-sided transaction platforms which requires a somewhat different analysis.

Under the Supreme Court's case in *Ohio v. American Express*, relatively new case and not that many courts have dealt with it yet, having two do it at the same time under the same facts for the same markets, I think also presents really big issues.

Once the markets are defined and properly understood as antitrust markets, the question is does Google have monopoly power; that's an identical issue in both cases. Monopoly, as we know, is not illegal. Justice Scalia explains that in depth in *Verizon v. Trinko*. So it has to be conduct, it's the conduct -- is there anticompetitive conduct as opposed to just vigorous competition, on the merits, that will have to be decided in both cases.

And as you can see in plaintiffs' complaint, there is a lot of conduct alleged there, and that conduct will have to be evaluated by this Court and the other court, if you choose to keep the case, both for the antitrust claims, but also for any of the state law claims where it's the same conduct, whether the vehicle it's challenging is a state law statute or antitrust laws.

And so all of these I think -- that's just a few of them, that's just getting through the earliest part of the

case, but there are many identical issues, and we think for that reason that Your Honor should transfer this case.

THE COURT: All right. The last question for you. Can you remind me of the cases that you said you thought were the most on point with regard to transfers that involve going into another pending action where there were class allegations and class certification issues? Was that the *Cephalon* case you referenced?

MR. MAHR: *Cephalon* is one of them. There are a host of enforcement actions, the *FTC v. Watson Pharmaceuticals*, which is 611 F.Supp.2d 1081, *SEC v. Captain Crab*, 655 F. Supp. 615 -- there are some others, I don't want to list them all here, I think they're in our brief -- but these are cases where there were enforcement actions that were transferred under 1404(a) into jurisdictions where there were -- where there were already pending class actions.

THE COURT: Right. The similar litigation was litigation that involved class certification issues.

MR. MAHR: I know that for a fact in the first two I mentioned, and that's why I didn't want to read all the ten because I'm not sure in every one.

THE COURT: All right. Thank you, Mr. Mahr.

MR. MAHR: Thank you.

THE COURT: Well, I spent more time with Mr. Mahr than I thought I might.

Oh, one moment. I'll wait.

(Pause in the proceedings.)

THE COURT: All right, Mr. Keller, if you -- if you would like to make any additional remarks, I'll give you a few minutes because I spent more time with Mr. Mahr than I thought I would.

MR. KELLER: I don't need any more time, Your Honor. If you have questions, I'm pleased to go back to the podium. But otherwise, I'm happy to rest.

THE COURT: No. I think I've had all my questions answered. Thank you.

Thank you to both counsel. The presentations have been very helpful.

MR. KELLER: Thank you, Your Honor.

THE COURT: So I think before we break today, I had a couple of other issues that it made sense to discuss briefly. So the first is the where you stand on the protective order. You will recall that when we met the last time for our conference, the aspiration was that we would have a protective order in place before an OGP went out. And I understand the parties have been working on the protective order, but maybe you can tell me where that process is right now.

MR. YETTER: I'm happy to give it a try.

MR. LANIER: As am I. We'll both give it a try,

Your Honor.

THE COURT: All right. Mr. Yetter, you're at the podium. You can start.

MR. YETTER: All right, Your Honor. When we were last together on February the 4th, as the Court will recall, we had already been discussing the protective order for some time. There was two issues that had come up, and those were issues that are Google had raised that we believe are important additional protections to the template that they have we've already agreed on. The parties have agreed on the protective order largely, the protective order that was entered in the Search case in D.C.

And the two additional protections that we were asking for that we had raised and we were in the midst of discussing were additional disclosures. And the disclosures were as to out -- third parties, essentially agents, consultants, and experts of either side, that would have access to confidential information of the producing party or a third party, first just their identities, and second -- and that would be reciprocal; and, second, what Google was proposing was that the experts and consultants for the Plaintiff States would also disclose their affiliations with competitors or complainants of Google.

And as we told the Court we would, we have had many discussions about this. We have not been able to reach

agreement. So those two issues are outstanding. I can go into them if you would like. I can go into each one of them briefly.

There is now a third issue, however, and I'll let counsel take that up, which the Plaintiff States after the last hearing have now asked us about, proposed to us, which we do not agree with. And essentially the Plaintiff States have asked for a provision in the protective order that we believe essentially is a do-not-break-the-law provision that isn't appropriate for a protective order that doesn't have any basis for it and that we think is unwarranted.

But if the Court would permit it, I can briefly go into the two issues and our position on those two issues, and then counsel will certainly give the plaintiffs' position.

So the two issues we have, we think, as the Court commented at the last hearing, the disclosures to -- right after this lawsuit was filed -- to the national media, counsel for a robust -- in fact, I think in the Court's words, a quite robust protective order here. And so what we have is an additional provision that we think would be preventive, that would discourage recipients of confidential information from thinking about, for whatever reasons they may have, breaching the terms of the protective order.

The significance of that, especially in a situation like this, is there is going to be a tremendous amount of

highly confidential information exchanged between the parties, and it's not just going to be Google, so there will be third parties. This is an antitrust case, and competitive information will be exchanged that needs to be -- that will be produced voluntarily in some situations, involuntarily in others, that needs to be produced with the utmost care and with the certainty that there will not be further disclosures. This is not about what happened in December, as much as what's going to happen over the next 12 to 24 or 36 months.

And this provision of identifying the recipients before they get confidential information is hardly a new one, as we -- I believe the Court may recall, at the last hearing, I explained that what we were proposing was a template provision in the Western District. Every case, every civil case, patent or otherwise, has a provision that says before you give your outside experts and consultants highly confidential information from the other side, you have to identify that person to the other side.

And every one of these -- and that Western District provision, and every other type of protective order that has this, does it for a reason. It's because the producing party is in the best position to raise a concern, an objection, ahead of time before the recipient, before that outside consultant or expert, receives this confidential information,

so that extra steps could be taken. It could be nothing more than simply making sure that that expert or consultant has no question about the strictures of the confidentiality, or even maybe have -- potentially has to have additional confidentiality commitments made.

But the reason why that disclosure to the adversary, to the producing party, is made is because that party is in the best position to know where there's going to be concerns. It's not just the Western District, as the Court may have seen this morning. And I know the Court is very diligent about reading your filings. I don't know how you could have read it this morning, but we actually filed something this morning that lays out both sides.

So when the Court gets back to your chambers and you have an easy 45 minutes to read, which I know you don't normally have, both sides filed a joint status report on the protective order. And so what we have teed up is these very issues that counsel and I will talk about, so that you can give us your guidance because we have reached an impasse. We can't work this out. So what you are getting now, Your Honor, is a preview of what you're going to read.

THE COURT: Well, I have not had time to read it, and so you anticipated what I would likely have been asking the parties to submit, so I'm glad it's already been submitted. So we can review that and then potentially, if

needed, have further discussion with the parties before making a call on what the protective order is going to look like.

MR. YETTER: And so with that, Your Honor, if I might make a suggestion, because I know the Court's schedule is always very busy. Both sides -- this is a joint status report. We've been working for a couple of weeks now on it. Our -- the Google position is there, the States' position is there on these three issues that I have been talking about. I'm happy to deal with them all. But maybe you don't need as much of a preview as a chance to read the submission, and then maybe you call us back in, Your Honor, at your convenience, and we will have this very discussion again and we can get into the details. But at that point, you'll be up to speed on where we're at.

So I'm happy to give you more of a preview, or we can let you read and then we'll come back and argue it. It's up to the Court.

THE COURT: Well, I wouldn't mind a preview at this point, but let me just see if our court reporter needs a break here before we do that.

(Court conferring with the court reporter.)

THE COURT: All right. So I think what we may do, because I think it might be helpful in terms of just efficiency, if you will both be able to give me a preview,

then between that and reviewing what's been submitted today, I may not need to call you back.

So let's just take like about a ten-minute break, and come back and we'll hear more on this.

MR. YETTER: Thank you, Your Honor.

THE COURT SECURITY OFFICER: All rise.

(Recess taken.)

THE COURT: All right. Please be seated. We're back on the record in 4:20-cv-957, State of Texas, et al versus Google.

When we left off, Mr. Yetter, I think you were going to lay out Google's position on a couple of these points regarding the proposed protective order.

MR. YETTER: Yes, Your Honor. I believe the filing this morning is Docket 81, so it should be the newest filing in --

THE COURT: Docket 83.

MR. YETTER: 83, excuse me.

So the two points that Google has raised is, one -- they're both disclosure points -- one, identity; and, two, affiliation. So for the identity point, what Google is proposing is that this protective order have in it all -- already it has it in by agreement that all outside consultants and experts have to sign essentially a certification; it's an appendix that says I've read the

protective order, I agree to abide by it, I'm subject to enforcement by this Court of any breaches. That's already in the protective order; that's agreed.

What we're proposing is that each side exchange those signed certifications before they allow confidential information to be provided to that outside expert or consultant. And the reason for that, Your Honor, by giving an identity, then the producing party has an ability -- and this would be the same for third parties -- they have the ability to speak up to say I have a concern; and if it's a serious concern, to even bring it before the Court. I have an objection to this particular person because I, as the producing party of confidential business information, happen to know or strongly suspect that that particular individual who is about to get my confidential information works for a competitor or works for a litigant against us, or some -- has some reason that they -- that would increase the risk of misuse of the information.

And that is not something that we made up, frankly. Google didn't propose it in the Search cases because when that protective order was negotiated, there had been no disclosures to the New York Times and to the Wall Street Journal; that happened literally days after the Search order in D.C. was signed. But we're proposing it here because we think it will have the preventive effect, it will have a

prophylactic effect. And as I said, it's not our idea. This is common. It's common in the Western District for all civil cases, and it's common in this district, Your Honor.

Chief Judge Gilstrap, as the Court probably knows, in patent cases, has a standard template protective order, and everybody in patent cases in his courts and in a number of other courts in this district, including many of the magistrate judges, have an obligation to get that what they call an undertaking. The certification is signed by the outside expert or consultant. And before giving that consultant or expert confidential information, they have to identify it, provide it to the other side, the producing party, along with some other things that I'll get to in a minute.

Now, the State of Texas has said, oh, wait a minute, there are rules for when a litigant has to disclose their testifying experts and there are rules that allow a litigant to keep secret their nontestifying consulting experts. And so by proposing -- making this proposal, we, the Plaintiff States, would be hamstrung, our litigation strategy would be compromised if we have to tell Google, or Google has to tell them, about the outside consultants or experts before they get confidential information.

The reality is, yes, in that respect, that disclosure would mean you have to identify testifying experts

earlier, and identify consulting experts if the party wants them to get highly confidential or confidential information.

And the tradeoff, Your Honor, is because in some situations, there is such important competitive information, like I think most practitioners would agree, in all patent cases there is a concern that patent information could be used by an adversary's patent prosecutors to -- for business reasons. And in certain commercial cases, competition cases -- antitrust cases being, at least I would submit, high on that list -- there is a concern that competitive information could be misused either by the plaintiff or third parties or by some other parties in the case.

So the States have pushed back very vigorously that they're not prepared to waive their right to keep their consultants secret and to delay disclosing their testifying experts. The reality, though, Your Honor, is that this -- these very States, including the State of Texas just a couple of years ago, have entered into exactly this kind of protective order.

And what we provide in the update, in the status report to the Court, are the forms, really three basic precedents that we provided to the Court: The Western District template, Chief Judge Gilstrap's patent protective order template; and by the way, this Court and Judge Mazzant have entered protective orders in this division that have an

advance disclosure requirement as well; and then thirdly, a protective order that the State of Texas and other states in a multi-district litigation against the United States Government entered into just two years ago -- two years and three or four months ago, in the Northern District of California. And in that protective order, which we summarize for the Court on an exhibit to the status report -- well, we excerpt it, we take out this particular clause -- it has the very same advance notice.

The second objection or the second compromise that the Plaintiff States have emphasized is they said, well, it really shouldn't be the producing party who polices these certifications, it should be the Court and the Court staff to police it. And our response to that was that's not feasible because the Court and the Court's staff has neither the resources, nor the time, nor frankly the interest, to be figuring out, from these certifications, does this disclosed expert or consultant present a risk of misuse of confidential information.

The Plaintiff States have said, we'll provide all of the signed certifications to the Court, to Your Honor, under in camera so that Google doesn't see them. And then at that point, the Court would do nothing with them except keep them there. And if there's a breach, we at least would be able to go to Your Honor and have you give us the signed

certifications, presumably. Although, the Plaintiff States today are objecting to that very relief that we asked for from the December disclosures.

The problem with that is that that's relief once the cows are out of the barn. And what we're looking for is a provision that helps us prevent future disclosures. And so while remedying a breach is important, we prefer to prevent them in the future. And we do believe that if both sides have the ability to police, to monitor, to speak up, if there is an issue with a potential disclosure to a potential outside expert or consultant, then that would be another step forward in ensuring that this highly confidential information produced by the parties and by third parties is kept confidential as everyone agrees they should be.

One last point that the States have brought up that I should mention before I move to the next disclosure request that we're making is that, respectfully, reflects the problem that we have. So in December, when the draft Texas complaint was disclosed -- a portion of the unredacted complaint was provided to the New York Times and the Wall Street Journal, both of which are very big publishers that had been adverse to Google in the past -- everyone agreed it was a significant issue and that it had come from the investigative side of the investigating States.

Google never saw the draft complaint, they never

had access to it. We still have never seen it, so it couldn't have been from us. And despite that, we got push back from the Plaintiff States as we tried to investigate it.

One simple question we asked was who, Texas, did you allow to see the draft complaint? And Texas simply said we're not going to tell you. We're not going to tell you who the states or territories are that we gave access to. They did say there was 35 of them out of 51. But we're not going to tell you who. We're not going to tell who the outside consultants or experts were; that's not for you to know.

Today -- and we still don't know, even today. And we've asked again, would you tell us who those were. So we sent letters, two letters, to every one of the 51 states or jurisdictions that were in the multi-state investigation. We got responses from many, but not all of them. In fact, we didn't get responses from some of the Plaintiff States in this case, from three of them, until last night after we circulated our draft status report.

But what has now come up and what the States are now suggesting, which as I said reflects our problem here, Your Honor, and why we think this protective order needs to be robust, is that the States are now suggesting that it wasn't them at all; it wasn't anyone on the investigating States' side; and that it was perhaps some sort of a SolarWinds-type hack; that some Russian hacker, for whatever

reason, would go in and find the State Texas draft complaint, and take ten pages out of the middle of the complaint and send it to two major publishers, the Wall Street Journal and New York Times. And so it's not the States' faults -- fault at all; and for that reason, the protective order needs no further protections of confidential information.

The information that was disclosed in December wasn't just Google's, it was also third-party information. So with respect, we don't think there's any -- we don't think this new approach of denying that the disclosures even happened, that the breaches even occurred, is an answer to the fact that we need protections. And we're asking for two reasons.

The second one, very briefly, Your Honor, as I already mentioned, first, the identities, and then second -- that would be reciprocal -- and then, second, for the experts and consultants that the Plaintiff States retain, that they disclose whether they have an affiliation with a defined list of Google competitors or complainants in the ad tech, advertising technology, business focused on what we believe is the relevant scope of this case, so that we will know, as they provide those disclosures, who the person is and whether they have -- for example, whether they are working for one of the ad tech competitors of Google. We can say, then, Your Honor, we have a concern. We would like to raise an

objection or we need extra protections or, frankly, we don't think that person should get access to our data at all, given the risks. We've suggested that.

We will say that other courts have similar requirements. Chief Judge Gilstrap's template protective order in patent cases requires that a curriculum vita, a resume, of each of the potential recipients of confidential information be provided, and others have similar requirements. And all it simply does, Your Honor, is it helps the recipient, the producing party, to understand is there a particular concern here with this expert.

We think if identities are disclosed, which is a very simple level of disclosure, that the extra affiliation, which we would narrow down to a very defined list that can simply be read and checked off by the potential expert or consultant, would not be particularly onerous.

Last point on these two issues, and then I'll let counsel raise their issue, is that these -- this is not meant to limit who the Plaintiff States can hire. This is meant to make sure that we don't have further disclosures in the future. This is designed to make sure that if there are risks, that we raise them beforehand so that we don't have a disclosure, we don't have misunderstandings, so that confidential information in this case can be shared promptly and with confidence that it's going to be kept confidential.

If plaintiffs wish to have a secret consultant that they never tell a soul about, they simply have -- they simply need to make the choice not to provide them confidential information of Google or third parties. This is as much of a protection for Google as it is for third parties and as it is for the States, assuming that the States have confidential information to propose.

In this situation, I don't think the States believe that their ox is being gored, because they're not providing confidential information, they're gathering it from others. And so their interest in protecting it perhaps is less, and their interest in litigation, strategic litigation advantages, perhaps is more. Thank you, Your Honor.

THE COURT: Thank you, Mr. Yetter.

Mr. Lanier?

MR. LANIER: Thank you, Your Honor. I think it's good afternoon at this point.

Your Honor, I listen to this and I'm concerned. I'm concerned because the idea that an unredacted complaint was leaked, which is the way it was first vocalized today and has been repeated, is itself not anything that we're certain is true. What is true is that there was an unredacted screen shot of a page of a complaint, and we know about that from the New York Times and the Wall Street Journal. And we discussed that before you last time.

We've continued our investigation. We certainly did not leak it. No State of Texas employee has leaked it that we've been able to determine or even reasonably think of.

But what Google has done is tried to use that as a lever to get an unfair advantage not just in this litigation, but in broader litigation throughout the United States. Because if you listen in detail and look in detail at what they're asking for, they're asking for any expert that we may use to consult simply as a consulting expert, to look at code, to look at whatever they may -- at analytics, to look at whatever they may need to look at.

If that expert is also consulting in an investigatory action where another governmental entity is looking at an investigation, or a private plaintiff is looking at an investigation or, heavens, a foreign nation is looking at an investigation -- if that person is consulting, Google wants that consultant to have to disclose to Google that they're consulting on other potential litigation that may one day be filed or not be filed, that they're consulting on investigations that may or may not be ongoing, to which Google has no right to know. And it either intrudes upon those other cases unfairly and unjustly or it limits the field of experts that we're allowed to consult with.

To wear the guise of there was an unredacted leaked

page, therefore, Google's entitled to this information, is an attempt to lever something which just isn't proper. To wit, I offer the following responses.

Number one, on the Western District protective order form, there is a difference. And I would urge this Court, if the Court is going to be persuaded by the Western District, there is a difference between Western District form and Western District practice, at least so far as I've ever been involved, and I believe with others, based upon our due diligence work that we've done to this point in time.

Both the Western District and the Fifth Circuit have said that parties need not disclose the identity or opinions of nontestifying or consulting experts. And I think that's true and accurate. So the idea that the Western District should dictate this simply off of their form, then I would say look to their practice if you are so inclined to be persuaded by them.

Point number two. Judge Gilstrap does have a patent order which has in its standard form a disclosure of experts, not with all of the extra data per se. But that's only in his patent order, it's not in his nonpatent order. It would not apply to this case, if we were in Judge Gilstrap's court, unless he chose to extend it.

Now, I haven't had an antitrust case in his court before. The last antitrust case I had in the Eastern

District was back when Judge Folsom was on the bench. But certainly in Judge Folsom's court, we weren't required to do this. That reference of that case was Becton Dickinson -- actually, it was *Retractable Technologies v. Bectin Dickinson*. And we certainly didn't have this requirement in that court.

Point number four, or three. We have suggested an in camera tender of whatever you think is important. And while Mr. Yetter says that an in camera tender isn't adequate because you don't have enough manpower to do the policing job, he says it in the same time where he says this won't take any big deal, it's just check off a list and see if there's a concern.

Now, is his concern an improper leak or is his concern getting insight into who the experts are? Because if his concern is an improper leak, you've got all the power and authority there is. And, ultimately, it's not going to be anything that Google can do; they have no authority and no power over an improper leak.

If they see our experts that are consulting only and they get that insight into them, or if you read it as they've written it, they find out, oh, Lanier's going to mock try this case or he's going to have a jury consultant who is going to look at this, that, and the other, and they get that data, what are they going to do? Are they going to tell me

I'm not allowed to hire that person? Well, they can't do that. Are they going to come to you and say, don't let Lanier hire this person? And you're supposed to be in a position then of saying, oh, wait a minute, maybe Google doesn't like this person's other work, so you can't hire him, Mark? Or are they going to come to you and say, we're real suspicious about this person, so will you really put the hammer on 'em and put something really restrictive down like a computer tracer on their computer? You're not going to do that either.

All the enforcement is yours. You've got the only enforcement power, but you've got it. And if you find someone's violating your protective order you've signed, you can send them to jail, you can fine them out the wazoo. You've got all the power in the world, but it's yours.

And so we offered, as a compromise, to avoid this hearing, that we will submit in camera to you signed, sealed, and delivered CVs; as much, as little, data as you want with anybody who is going to see anything confidential or highly confidential. And we think that resolves everything without giving an undue advantage to either side, because both sides can do the same thing.

So we believe the solution to be the power of the Court. We think that everything else is unfair, unnecessary, and is a levered attempt to get an advantage in the

litigation that they shouldn't get.

THE COURT: Let me ask you two quick questions --

MR. LANIER: Yes, sir.

THE COURT: -- before you wind up. The first is, as I understand what Mr. Yetter is suggesting, the purpose would be that the information on an expert or whoever that is going to get the information, is going to be disclosed to the other side, I suppose, with some sort of sufficient time built in that if they had a concern, they would raise it with you. And if you couldn't resolve it, they would raise it with the Court, and I suppose the request would be, please prevent plaintiffs from sharing this information with this individual or this entity for X, Y, and Z reasons. Is that generally -- is that your understanding of what's being proposed?

MR. LANIER: I think that's exactly what's being proposed.

THE COURT: All right. And so the second question is you've talked about some of the justifications that Google provided for entering that type of protective order, including the Western District practice, and the Eastern District or other districts, but he also mentioned that he felt the State of Texas had entered similar agreements in other cases. And I wanted to get your response on that.

MR. LANIER: Your Honor, I think he's suggesting

the *Affordable Care Act* case that Texas agreed to disclose experts, and that's certainly a different case. It's certainly got different parties. It's -- and by that, I don't mean the State of Texas is different, we are not, but what I mean is the defendants are quite different.

Google is a data mining company. We google things because they have mined data. Their Gmail accounts are set up with an ability to mine data. Judge Koh expressed great concern, in the Northern District of California, at a hearing just a few weeks ago that was reported in Law360 -- I wasn't at the hearing, but she quoted that she was, quote, deeply disturbed by the Google lords tracking her court site.

And this is a different situation which calls for a different approach by the State of Texas. I mean, I've probably got a boatload of cases where I may not mind a mutual disclosure of experts. But in a case like this, we absolutely oppose that.

Now, the other side of the coin, though -- you asked me a very good question, but there is another side to it. And the other side to it is why didn't Google require this in the DOJ case? They negotiated that protective order. They didn't require it there. They didn't require it in the Colorado case, though that was a negotiated protective order, also. And their answer is, well, but we didn't have the leak.

This is not about a leak when they're making the argument Mr. Yetter's made to you of let's find out who the experts are because if we don't like that expert having access to our information, we want to be able to strike the expert. That's why I say that the leak is a lever to try to get you to enter a protective order that they've said they don't need in the DOJ case, that they don't need in Colorado.

So I think that it's an issue of looking at Texas. Texas did agree to it in the *Affordable Care Act* case, but those are different parties and a different case. And if the parties agree to waive that confidentiality, God bless them, let them go straight. But we won't make that agreement here because we think here, in this case, against the data mining company, it gives them a substantially unfair advantage against us.

We believe it will also inhibit a number of our experts from even working in the case. Because if an expert's working in another investigation, let's say there is a case looming out there -- and I've got one that comes to mind, simply because they've asked if we can share an expert -- and that case I won't even say, give a hint of, what it is. But I'll tell you that if the expert has to disclose, oh, yes, I'm also working in another case on behalf of these plaintiffs and investigating Google for this, that, or the other, that expert will flat shut the door to us. And

yet, we need that expert to help us navigate through the labyrinth of data and information and processes that make Google what it is, and that form the basis of this complaint.

And so I think in short, this is an unfair advantage. I think it's an advantage they don't need. I think it's an advantage that is hiding under the illusion of some unfortunate wrongful disclosure of a screen shot of confidential information in a case, in a complaint. But I don't think anybody's insinuating that an expert did that. And I don't think that even the investigation that Google's done has been very in depth, because we know there are a number of names we've given them that have not been investigated by them, of people who saw the complaint.

And the three that didn't answer until late last night is because -- those three Plaintiff States is because Google didn't tell us until recently that those had not answered. And so we sent out an email, please answer. You had asked us to put together a network to deal with these issues. We've done that, and this was part of the network. And we got them the answer almost immediately once they told us they had not heard from those states.

So the last point that Mr. Yetter left for me to cover was what we had asked for in this case, and we had asked for a protective order that stops Google from data-mining anybody associated with the plaintiffs' team.

And Mr. Yetter previewed his argument to that by saying that basically Mr. Lanier is just saying, um, don't do something illegal.

But I will tell you that the argument that Google made in the Northern District case that I was referencing before, in front of Judge Koh, that as written by Law360, quotes Google's counsel in that case, Stephen Broome of Quinn Emanuel, argued that Google tracks users in order to serve clients who use Google analytics on their websites; and, therefore, Google's activity is shielded from Wiretap Act violations under the ordinary course of business exemption.

So if Google data-mines and believes they're shielded from the wiretapping clause because of that, as represented by counsel reported by Law 360, but put it in quotation marks, if in fact that is the position of Google, then all we're asking for is please say that you will not data-mine on any of the plaintiffs in this case, or any of the witnesses in this case, or any of the experts. And that's our request, and it's one that they won't agree to do.

And so those are the issues as seen from the State of Texas. And I thank you for giving me this time.

THE COURT: I have -- Mr. Lanier, I have one more question for you, and I'm going to follow up with Mr. Yetter on this briefly.

Coming back to the disclosures with regard to

individuals receiving confidential information and this affiliation issue, I want to make sure I understand what that additional requirement looks like. It is a disclosure of affiliations. I understood Mr. Yetter to be talking about affiliations with competitors or something like that, as opposed to people affiliated with investigations from their governmental entities.

MR. LANIER: Your Honor, they've asked for signers to disclose three things. Number one, competitive relations, which is what you've understood Mr. Yetter to say.

Number two, any involvement in adverse litigation; that would include as a consultant that doesn't have to be listed, for example, under the DOJ protective order. So if a consultant's working for us here, they've agreed DOJ doesn't have to disclose it. But if that consultant's also working for the DOJ, then it will have to be disclosed here, and it's a way around that DOJ protective order.

And then the third are people involved in any investigation. So it doesn't have to be active litigation, it can be pre-litigation stage, and that will give them insight into that.

Those are the three areas that they have asked the signers to disclose, Your Honor.

THE COURT: And so the last followup I have for you, and for Mr. Yetter, is that he had also mentioned what I

suppose is an alternative in terms of that additional information. He spoke about individuals who would be receiving that information providing a CV. Now, a CV might very well not have that kind of information included in it, it would have the things we typically see in a CV included in it.

I suppose I know the answer to this. I know that the States generally are still not comfortable with that, but -- or would the States be more comfortable with that?

MR. LANIER: Your Honor, I guess, I mean, that's -- would we be more comfortable if it would be a number 10 on the FBI's most-wanted list than number 5? Yes. But we would not be very comfortable with it regardless. I guess it would be more comfortable. We would certainly love to give that in camera to you. That would not be any problem at all.

We'll give you anything in camera on any of these people in any way, shape, form or fashion they want, as long as it's in camera. And if you deem it one where you believe it's important that Google have it, and we look at it in detail, then we can have a hearing, we will argue -- you have all the power in the world, and we have all the confidence in the world.

THE COURT: All right. Thank you, Mr. Lanier.

MR. LANIER: Thank you, Judge.

THE COURT: So, Mr. Yetter, I have a follow-up

question for you that's raised by what your friend on the other side was just saying, which is that if there had been no leak in this case, in this case would Google be seeking these protections regarding this order?

MR. YETTER: Your Honor, I think absolutely we would not, because we negotiated a protective order in the Search case without these protections, but it was literally days later that there was a leak here.

And if I could correct the very able arguments of my -- of my colleague, it wasn't just a screen shot. And we've never seen what the New York Times or Wall Street Journal got, but what they published in the newspaper was far more than just one page. It was, as best as we could tell, ten pages out of the middle of the draft Texas complaint that had confidential information on both Google and third parties in there.

Now, what I didn't hear counsel say, and maybe they're not pursuing that argument anymore, is that this somehow was a Russian hacker that got in there. This had to have come -- this disclosure had to have come from someone on the investigating States' side, and it had to be from one of the 35 states or territories that Texas had told us had access to the draft complaints.

Now, what the State hasn't told us, and what we don't know, is that how many of the consultants got access to

the draft Texas lawsuit. And we have to believe -- that's why they hired them -- that many of them, if not all of them, have it. And that's the issue here, Your Honor.

So what counsel's talking about, why are we focused on experts and consultants, well, they're the ones that can have mixed agendas, mixed allegiances. The employees of the -- I'll just pick Texas as an example -- the Office of the Attorney General, their allegiance is just to the State of Texas, their job is to work for them, but consultants can work for lots of people.

And one of the things we know in this case, Your Honor, and this is in the report, you'll see more detail on it, one of the consultants that Texas hired worked at length and very publicly for News Corp, the parent company of the Wall Street Journal, which has been over the years a very vocal, publicly vocal, opponent and a very big publisher against Google. And that is exactly the sort of consultant that we would have raised a flag and said this is a problem.

So what we're suggesting -- and I agree a hundred percent with what counsel just said -- is this Court holds all the power to punish a breach, but we would much prefer to prevent a breach than punish one.

And so the alternative that they suggest that somehow this, Your Honor and your staff would have to be sifting through resumes of experts and consultants to see if

something bothers you about that consultant, that that consultant may have a mixed allegiance, a mixed loyalty, that could raise the risk of misuse, is not a workable alternative.

Now, if the Court wants to limit this to outside counsel for -- on both sides so that counsel can raise concerns, that would probably be a fine compromise there. But it doesn't make sense for the Court to have to police issues that the Court just doesn't have background on.

Now, as a producing party -- now, these protective orders are protective orders in the Eastern and Western and Northern District, they protect the third parties as well. And so if you're going to give third party data, you have to give them advance notice. And so the protective orders are more -- this advance disclosure is more than just protecting Google; although, that's what we're here on behalf of.

Now, as the Court asked the question, you give some advance notice, in the Eastern District it's ten days; in the Northern District, that *Affordable Care* case that Texas agreed to the very advanced disclosure that we're asking about just two years ago, it was five business days; in the Western District it just says advance, prior to disclosure you have to provide the notice.

And the point of that is simply this. The producing party is in a better position to raise an

objection. Raising an objection, the Court could say I'm not concerned about that objection, or impose some additional restrictions. But the point is let's prevent disclosures, not punish breaches, and that's what we're trying to -- that's what we're suggesting here, Your Honor.

Just, if I may, a couple of responses to what counsel argued. This is not about jury consultants. If we want to take jury consultants off the list, I'm fine with that. We can -- this is not who we're worried about. I don't believe jury consultants is the issue; it's outside experts and consultant who work for others in the industry.

Now, one of the things that counsel brought up that these consultants may be working for someone else that's about to bring a lawsuit against Google, that's exactly the situation that would warrant heightened protections. Because one of the things that the -- we agree on a lot. One of the things the parties agree on is that whatever information is disclosed and exchanged in this case stays in this case and cannot be used for other cases or other matters, or certainly for business matters.

And so if one of these experts or consultants that the State of Texas or the Plaintiff States decides to hire is working for another potential litigant against Google, that raises exactly the risk of misuse that we're focused on; and at a minimum, that expert or consultant should disclose that

we believe, to Google or to the producing party so that we can raise it with the Court if we have a concern.

But it's the additional risk that we're focused on here, Your Honor. If a consultant or expert has another agenda or loyalty that could raise the risk of misuse, this would show it, this would -- maybe not perfectly, but this would be a step in the right direction. That's why we're asking for it, Your Honor.

And this, counsel's suggestion that this is all about somehow compromising the Plaintiff States' litigation strategy is off the mark because this is a mutual exchange of information. They would learn about our outside consultants and experts just like we would learn about theirs. They would have the ability to object to ours just like we would have the ability to object to theirs. Neither side gets an advantage, certainly not an unfair advantage. No more than when the State of Texas agreed with the DOJ in the *Affordable Care Act* case that they would exchange experts and consultants. No more than in every one of Judge Gilstrap's patent cases does one side get an unfair advantage over the other.

And the reason I would suggest that patent cases have it as a standard in the template is because of what I mentioned earlier. Patent cases have this very important inside technical information, source code, things like that

that could be misused. Not every civil case has that. A breach of contract case doesn't raise that risk. A competition case, an antitrust case, which involves discovery from competitors and potential competitors and other parties, involves that very risk. And that's why in this case it's a reasonable, limited, and appropriate additional protection given the what was once an admitted breach that has already occurred.

Counsel raised the one last issue. And I wasn't entirely clear what he was suggesting, but he criticized Google as some sort of a data mining company. And we've seen lots of references to that by the Plaintiff States in the media in the weeks since this case has been filed. And as such, counsel seemed to suggest, well, we would agree to an advance disclosure provision in a protective order with other litigants but not with Google, as if the disclosure of the breaches in this case came -- that have already occurred were from Google's side and not the Plaintiff States' side. And that couldn't be farther off the mark.

There is no question that Google has privacy policies and disclosures that it gives to all of its customers, and tells them exactly what information Google collects, for the customers' use or the customers' protection, or for advertising purposes, or to make their products better. There is not a single reference anywhere,

and the plaintiffs do not provide this, that Google has any right to somehow gather -- target, gather, and use confidential communications of their adversaries in the courtroom. And that's what the request that the States have now made, we believe not for out of their own legitimate concerns, but really to -- perhaps for media concern, media efforts, to aggrandize their position, to denigrate Google, to make a splash.

One of the things that the Court will see in the status report is after the last hearing where this whole issue of data mining was first broached by counsel, State of Texas had a series of press conferences right after the hearing ended, and this topic of Google data mining and searching emails of litigation adversaries, and how the State of Texas has told its lawyers don't use Gmail during this case, they went over and over it again. And respectfully, Your Honor, they have given no evidence to the Court or to us.

Because we've asked them over and over again where does this come from? Why are you demanding this? Now that there's been a breach that came from your side, now that we've got a protective order and you're trying to avoid additional disclosures, why are you asking for this provision that essentially accuses Google of spying on its litigation adversaries? On what basis do you have? And we've gotten

none. And, respectfully, we don't think it's a legitimate -- frankly, it's an outrageous request. We don't think there is any basis for it, and we've responded to it in the papers.

So to boil it down, Your Honor, what we think, this is the kind of case, given the stakes, given what the plaintiffs themselves have said are the importance of this case, the competitively sensitive information that's going to be exchanged, we need a robust protective order, we need more than the standard protective order which we already had in place before the last disclosures and breaches. And these two provisions, whether it's a resume or disclosure affiliations, these two provisions are both reasonable and targeted and help -- and we believe will help prevent disclosures and breaches in the future.

If the Court has any questions, I'm happy to answer them.

THE COURT: No. Thank you, Mr. Yetter.

Mr. Lanier, if you have any last comments, you can make those at this time.

MR. LANIER: Thank you, Your Honor. I'll be brief. I appreciate your patience.

Number one, it's important the Court know, and we'll put it on the record, the breach that's been alleged and apparently happened was not a breach from a consulting expert. Our experts had not been provided Box reader. So it

had to be one of the States that were provided it to see if they had come into it, or some type of a hacker.

I don't know all of the mysteries of hacking, and it seems almost TV-ish, but I do know that Jones Day has been reportedly recently hacked and that a number of their briefing ended up on the web. It's not unheard of. It happens all the time. I have no clue.

This is Google's situation, but this is not a situation where an expert leaked anything at all. Experts didn't have that Box reader, which is what the screen shots evidently came from.

Second point, heightened protection. You cannot get any greater protection than this Court and the criminal justice system. And this is not a situation where there must be all of these rogue consulting experts out there who are looking to disseminate to the press or to competition, in violation of a sworn commitment to keep confidential information. I think most consulting experts take those oaths and that verification extremely seriously, because if the consulting expert is found derelict or unfaithful to that affirmation, it destroys their business. I mean, they'll never get to work again. So I think again that's just a lever, that's just an explanation.

Point number three. Mr. Yetter keeps saying that this doesn't give them an unfair advantage because they're

willing to do the same thing. Well, it absolutely does. They don't have experts to designate to us, consulting experts, that are investigating whether or not the State of Texas might be guilty of this, that, or the other. And so it doesn't restrict their access to the small pool of experts that are truly available out there.

But if this burden is put on us, it will restrict our ability to get experts, because there will be a number of experts, several I know of, that will say we're not going to disclose, we're not allowed to disclose, under confidentiality agreements. We're not allowed to disclose that we're doing investigatory work for plaintiff -- potential plaintiff A, B, or C. So it's not, ah, this is equal playing field for each side; it is not even remotely.

And then my last point, and I appreciate your patience as I say, is on the data mining. The terms of service agreement that Google's entered into with everybody who opens up those accounts and uses Google, give them permission to do it. And if they don't want to do it -- this isn't about a press conference. We do -- we're the State of Texas. We are here on parens patria, and we are a -- patriae. We are here for all of that. And there are going to be press conferences because that needs to be reported out.

But what happens is those press conferences are

questions asked by the media. We don't dictate what they write or what they ask about. And I'm sure everybody's very interested in this and why Google will not just readily agree: No worries, no data mining, we'll put it in writing.

Thank you, Judge.

THE COURT: All right. Thank you, counsel. I'm going to look at the filing in docket 83, and appreciate your arguments on that issue.

The last item I want to cover today briefly is related to the protective order in the sense that it is the OGP. I have a filing that is document 80 from counsel that I've requested concerning your positions on any alterations that might need to be made on our dates or substance of the OGP. So I have that and appreciate it. I will say that I'm glad to see that you've agreed on the lot, including dates in the near term.

I have reviewed the position of both parties concerning Google's request that there be somewhat of a delay, I suppose, in Google's disclosures or that Google's disclosures come after the State has delivered to Google these investigative materials.

MR. YETTER: We're actually not asking for a delay, Your Honor. Sorry.

We are -- we, Google, are perfectly fine to have our initial disclosures on April 23. But the Plaintiff

States told the Court on February the 4th that they would move with all expediency as quickly as they can to get us all that they have on their investigative materials. As the Court knows, the States have about an 18-month head start on us. That's a substantial lead. And what we're asking is that both sides get to the starting point together. If I have that much of a lead, I would want the race to be short.

And so all we're saying is we ask the States to give us what they said they would, which is their investigatory file. If they do that this coming week, then we can be on target by April 23rd to file our initial disclosures. They haven't given us anything so far. And if they continue to delay, all we're asking the Court is to have our initial disclosures timed 30 days after the States give us the promised investigatory materials so that we can start to cut into that 18-month head start that the States have, and we can get closer to getting to the starting line together. That's our request, Your Honor.

THE COURT: Right. And I will hear from Mr. Lanier.

Mr. Yetter, one question I had for you is, as I read your position and as you've stated it today, you note that the States have been doing this investigation for some time and so they have, I guess you put it, an advantage on you in terms of starting out of the gate.

But two things that struck me are, number one, both sides are going to be able to supplement your initial disclosures. And my anticipation would be that Google will able to supplement and might have good reason to supplement as and when you receive all of those investigative materials. That was the first thing that struck me.

The second is that, and I think your colleague pointed it out earlier this morning, you know, the amended complaint is 450 paragraphs, it's 145 pages, and it's quite detailed. So from where I sit, it seems like you have a lot of information from the other side regarding the kinds of materials that you would need to make in your initial disclosures, and you will be able to supplement.

Now, I agree with you that the State had said it would produce expeditiously all materials that you've referenced, but I do wonder whether we need to necessarily delay these anticipated deadlines if it is taking the State longer or if what we anticipate is Google may need to do more supplementing as it receives more material.

MR. YETTER: Both very good points, Your Honor. Two responses. Perhaps what we can get from the State -- on February 4th, and I thought very forthrightly, counsel said we are going to go as quickly as we can, we're going to expeditiously give to Google all the investigatory materials, and offered *I want you to follow up with me at every hearing*.

So I'm following up with him at every hearing.

Perhaps what we can get from the State is a deadline. We will get you the investigatory materials on X date. What they have proposed to us is they'll give them to us on their initial disclosures date, which is April the 23rd, which would be ten weeks after they told the Court they were going to give them to us as quickly as possible, and about four and a half months after filing the lawsuit.

THE COURT: Mr. Yetter, have you received any of their investigative file materials at all?

MR. YETTER: Nothing, Your Honor. Zero. The reason why we're asking for them now -- and the Court is exactly right. We could do initial disclosures based on the new complaint, which is different, it is different from the -- they changed a whole bunch of things. But what we were trying to do is give more helpful, targeted, useful initial disclosures that we felt better about that might be more useful to the other side.

Now, again, without the investigatory materials, we will do the best we can. And if that is what the States insist upon and if that's what the Court thinks is appropriate, we definitely would supplement in the future, and we would do it that way. But what we're trying to do is get the States to give us that information. We don't want to be 18 months behind the entire case.

I have a very strong suspicion that once this case gets started, the States will be pushing for discovery very quickly, and we'll be then dealing with digesting the investigatory materials, 18 months of them, 3,000,000 pages of them -- some of which is our material, admittedly -- 64 third-party witnesses, at the same time we're dealing with what the State has said their first request is going to be, which was this very broad CID from last summer.

So we would like to just get caught up. We would like the States to give us that material as quickly as they can. We're ready to do our initial disclosures. We think they're going to be more productive and more useful, more efficient, if we at least have time to digest the investigative materials beforehand. Thank you, Your Honor.

THE COURT: Thank you, Mr. Yetter.

So, Mr. Lanier, Mr. Yetter has correctly quoted from our -- from the transcript of the last hearing. I know that the State had promised to expeditiously produce these materials. So if it's accurate that none of it has been produced yet to the other side, I will say I'm a bit surprised.

MR. LANIER: I don't think it's accurate, Your Honor. It has not been produced by us. It has been produced by DOJ. DOJ has given them gazillions of the documents at this point in time. They are the same basic documents that

we've gotten. These are the documents that come from Google that Google has given to us and to DOJ. We haven't turned around and said -- you know, send an email that says, *yeah, what they said*. But we recognize the DOJ has been doing that, was in the process of doing that, and we've been communicating with DOJ about that to make sure that those documents were being provided to Google. And so Google's gotten the benefit of that.

To the extent that not wanting to rehash anything in 1404, but if this is supposedly duplicative litigation of everything going on everywhere else, they already ought to have a good handle of what's going on enough to make their initial disclosures. The problem that we've had is twofold. Number one, we can't get a protective order in place such that we're able to give certain sets of documents because we've got those protections in place. And so we're still waiting for that from them. But we're able to still give them back their documents, and that's been done by DOJ; and, frankly, that's 90 percent of the discoverable investigatory materials.

If they want a list of the people that we've taken some statements from and things of that nature, we can try to compile that as well, but that's really small.

In the conference we had over this, Mr. Yetter and I discussed it, and I said please explain to me what you need

and why you need it now before initial disclosures, because it seems to me that we're going to give you the names of everybody in the initial disclosures. Does it make any difference if we need to cobble that together right now?

And his reply was -- if I understood him right, his reply was, well, we want to tailor our initial disclosures down narrowly to where you've done your investigation. And I said, no, no, no, no, no, no. Your initial disclosures are based upon our pleadings. You know, we don't investigate and then narrow the field so that now you only disclose off of our investigation; that will necessarily quench the need to full disclosure. And he said, well, you know, we think that it would be better for you if we didn't give you everything, if we just gave you the stuff that's relevant to what you were investigating. And I said no, no, no, please, we want full initial disclosures. And so that's part of the issue as well.

But in short, we're glad to give them what they're entitled to. If they want us to reproduce what the DOJ has given them on their documents, I think we can probably do that within a week or ten days and I'm glad to do that. But it's just going to be a, *yeah, what they said*. And we're prepared to move forward with initial disclosures pretty quickly.

THE COURT: Let me stop you for a moment --

MR. LANIER: Yeah.

THE COURT: -- because I do want to make sure that I understand this point. And it's where you began, Mr. Lanier, which is that what I hear you saying is much of what is being referenced as the investigative file of the State of Texas is comprised of documents that you're saying DOJ has already produced to Google. And so it sounds like your suggestion, number one, they already have a lot of these materials; and, number two, I suppose do we need to have a duplicative production, a full duplicative production, or can the parties work out something along those lines where you wouldn't have a duplicative production.

MR. LANIER: That's -- you hit the nail on the head. That's true. And these are also, by and large, most of the documents are documents Google gave us to start with, but there are some additional documents.

THE COURT: All right. So, Mr. Yetter, is -- so from Google's standpoint, it sounds like you do have at least some body of materials that are part of the investigative file, or would you say that's incorrect.

MR. YETTER: Unfortunately, Mr. -- counsel is mistaken on that. What he's talking about is the DOJ, which is in the Search case, has produced its investigative file on the Search case to Google in D.C. That is a different file than -- that's Search and Search advertising up in D.C. That

is not the investigative file for the ad tech case, at least that's not what Texas has led us to believe, which is the 3,000,000 pages, 64 third-party witnesses; and we've gotten none of that.

So, yes, I would agree some of that we presume is information that Google provided to the State. But we've gotten nothing from the third parties on their 18-month ad tech investigation, the case that we're here about now. So I think counsel is just flat wrong that the DOJ has been producing the Texas investigatory file; it hasn't.

Second, counsel said, well, we've been waiting for a protective order. Well, as the Court will recall, we've already got an outside-counsel-only arrangement as to the unredacted complaint, and we could -- we're certainly happy to get the investigative file on an outside-counsel-only basis, today or any day.

And lastly, counsel mentioned that on Monday when we met and conferred about this issue, that he said, why do you want the investigative file? And we said, well, we want it -- and I absolutely agree -- we said we would like to tailor our initial disclosures to what's relevant in this case. And as of Monday, we were dealing with the original complaint. In fact, in that same conversation we asked the States' lawyers, are you filing an amended complaint today and can you give us a heads up on what's in it? And they

said it's not finalized yet, so we can't give you that heads up.

So it is, yes, the amended complaint has been changed in many ways and it's been supplemented and added. We -- none of us knew that on -- at least on the Google side, on Monday. And absolutely we want to provide initial disclosures that are focused on the relevant issues.

As the Court has pointed out, the amended complaint is very long and very detailed. We could do our very best to do initial disclosures on that. But as to whether we have the Texas investigatory file, we do not. As to whether we need -- and we would love to get the protective order files, we definitely do, but is it holding it up? Not at all because we can take these materials on an outside-counsel-only basis.

THE COURT: All right. Well, it does sound to me like at least where you stand right now, for both sides, is that whatever was produced in the Search case, there is a concern that there needs to be production -- there may be similar, some -- at least some similar materials produced in the Search case, and even though the subject matter here is not the same, but I can see similar materials being produced, some amount of similar materials being produced. But regardless, it sounds like we would need to do a production, it sounds like, of the State investigative file to Google,

again for the reasons I've stated.

And I'm going to consider the joint advisory in terms of an OGP, but I do think that the amended -- the complaint and now the amended complaint are quite extensive, quite detailed, and Google will be able -- both sides will be able to supplement; and needless to say in this context, the Court will understand that a lot of supplementation may be necessary as investigative file materials are delivered, and that that may be happening over time because whatever part of that investigative file may need to be held until there is a protective order in place, could delay some of the necessary supplementation.

So unless -- do the parties have anything else you think we need to discuss today?

MR. YETTER: Happily, no, Your Honor --

MR. LANIER: Not for plaintiffs, Judge.

MR. YETTER: -- from the defense side.

THE COURT: All right, counsel. I think, most likely, I will probably go ahead and try and get the OGP done and in place, even if we haven't quite gotten the protective order done. We'll try and get the protective order done quickly.

If there is a delay in the protective order and we need to look at making an adjustment on the OGP, we can do that after the OGP goes out.

All right. Thank you, counsel. We stand in recess.

MR. YETTER: Thank you, Your Honor.

MR. KELLER: Thank you, Your Honor.

(Adjourned at 1:18 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Gayle Wear, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of Texas, do hereby certify that pursuant to Section 753, Title 28 United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated 22nd day of March 2021.

/s/ Gayle Wear
GAYLE WEAR, RPR, CRR
FEDERAL OFFICIAL COURT REPORTER